Supreme Court, U.S.
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ALEXANDER L. STEVAS
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CASE NO. 82–1019

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

QUALITY HEALTH SERVICE, INC., et al.,
Appellants,

v.

WILLIAM W. JOHNSTON, Chairman,
INDUSTRIAL COMMISSION OF OHIO, et al.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM THE DECISION OF THE COURT BELOW

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STATEMENT OF THE CASE

This is an Ohio Workers' Compensation rate setting case brought by the proprietary nursing homes in the State of Ohio against the Ohio Industrial Commission, its members, the Bureau of Workers' Compensation and the Administrator of the Bureau of Workers' Compensation. The Plaintiffs–Appellants sought declaratory and injunctive relief from the Franklin County Ohio Court of Common Pleas. The basis for their claim was that the defendants and their predecessors in office, had set basic workers' compensation rates of contribution for employers in proprietary nursing homes, which Plaintiffs claim to have violated the Equal Protection, Due Process and Establishment Clauses of the United States Constitution and the Ohio Constitution, and Ohio Revised Code Sections 4121.131, 4123.29 and 4123.34.

The case was tried on December 22 and 23, 1980. The Trial Court rendered its decision on January 5, 1981, and found that there were no violations of Plaintiffs' constitutional rights and that Defendants acted pursuant to their statutory duties. Plaintiffs then appealed to the Ohio Court of Appeals, Tenth Appellate District. That court, after a thorough review of the record, unanimously held that the evidence showed "that there was a sound, reasonable basis for the different classifications." (App. A-6) From that finding, Plaintiffs–Appellants appealed to the Ohio Supreme Court which, *sua sponte,* dismissed the appeal because no substantial constitutional question existed. Plaintiffs–Appellants have filed a Notice of Appeal and Jurisdictional Statement with this Court. They do not, however, contend that any Ohio statute is in conflict with the Constitution of the United States. Therefore, the following Memorandum is presented as a Motion to Dismiss the appeal and affirm the decision below or, if appropriate, in opposition to the issuance of a Writ of Certiorari.

STATEMENT OF THE FACTS

Approximately three-quarters of a century ago, with the inception of the first Workmens' Compensation Act in Ohio, the Ohio Industrial Commission established the State Insurance Fund Manual. Today, approximately 233 different catagories of occupation or industry are set forth in the State Insurance Fund Manual. These categories of occupation or industry are referred to as "manual" numbers.

The Industrial Commission of Ohio is charged, pursuant to Section 4123.29, Ohio Revised Code (Appellants App. A-48), with a duty to classify industries or occupations with respect to their degree of hazard. The Commission must determine the risks of the different classes and fix their respective rate of premiums based upon the total payroll for each class of occupation or industry based upon insurance principles.

When an employer first applies for workers' compensation coverage, the employer is assigned a "risk" number. The employer (or "risk") is then assigned to the "manual" category which most closely describes its operation. The employer is then required to pay for its workers' compensation coverage based upon the actuarial "experience" of the "manual" category.

The actuarial "experience" of a "manual" is basically calculated by taking the past losses and payroll of that "manual" to reach an average rate that must be assessed to collect sufficient premiums to cover the losses incurred by their manual category.

After assignment, if the employer is dissatisfied with the "manual" category in which he has been placed, he

may appeal his classification to the Adjudicating Committee of the Bureau of Workers Compensation. If the employer is dissatisfied with the Adjudicating Committee's decision, he may then appeal that decision to the full Industrial Commission. It is to be noted that none of the Plaintiffs–Appellants took such appeal.

As the basis for this class action, the Plaintiffs–Appellants have alleged that they have been arbitrarily and capriciously classified in the State Insurance Fund Manual for the past three-quarters of a century to their financial detriment and loss, causing grievous and irreparable harm. The basis of this alleged "wrong" is that they have had to pay premiums based upon the losses incurred by their own classification. Hospitals and non-profit nursing homes, however, have been classified historically in two different "manual" categories. Appellants alleged that this classification is violative of their various constitutional rights as well as a violation of the Defendants–Appellees' statutory duties.

REASONS TO DISMISS THE APPEAL AND AFFIRM JUDGMENT BELOW

I. WHERE THERE IS A SOUND, REASONABLE BASIS FOR A CLASSIFICATION, THERE IS NO VIOLATION OF EITHER THE DUE PROCESS OR EQUAL PROTECTION CLAUSE.

Appellants have assumed that by showing that there is a classification and then chanting the magical incantation "equal protection of the laws" that they have carried their burden of proof. However, as the Trial Court the Ohio Court of Appeals and the Ohio Supreme Court properly found, such is not the case.

In the Trial Court, Appellants introduced the testimony, by way of deposition, of William Darlage, an actuary for the Ohio Bureau of Workers' Compensation. Mr. Darlage testified that he performed an actuarial "study" to determine a base rate for the philanthropic nursing homes. When the base rate for the philanthropic homes was compared to the base rate for profit nursing homes, there was a "significant" difference.

Plaintiffs–Appellants now complain that "this study must be seen as the scientifically useless sham which it is and should be ordered held for naught by this Court as a matter of law." (Appellants Memorandum p. 12) Apparently Appellants wish this Honorable Court to make evidentiary rulings for the Trial Court. However, as the Ohio Court of Appeals noted:

> However, the deposition of William Darlage was introduced by appellants during trial. His study was marked as Exhibit A in the deposition.
>
> It is well settled that a party cannot complain of error that he has introduced into the trial. A party who has introduced a deposition into evidence cannot avail himself of error in its admission. (Citations omitted) (App. A-9)

Appellants introduced the study and now complain of its introduction. They did not, however, introduce any expert evidence to refute the study.

The Industrial Commission further introduced independent expert actuarial evidence at trial to support the classifications set forth in the State Insurance Fund

Manual. As the Court of Appeals noted at page 1526 of its decision (App. A-4), Robert Finger, a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries, testified in regard to the study performed:

> A. Okay. What the study was was to take out of Manual 9062, which includes a group of charities or non-profit organizations -- it extricated the nursing homes within that manual classification and treated that loss experience as if that had been a separate manual for the years 1978, 1979 and calculated what the base rates would have been for those years, had the non-profit nursing homes been split out.
>
> Q. And was that also done with 9045?
>
> A. 9045 is just the profit-making nursing homes, and they were already their own classification. So there's nothing special done with that.
>
> Q. *Are you aware of any outside insurance carriers that split out, say of the nursing home industry, on the basis of profitability or non-profit?*
>
> MR. WEBSTER: Object.
>
> THE COURT: Overruled. You may answer.

A. *In malpractice insurance it is very common for hospitals and nursing homes to be classified based on the profit, non-profit or governmental status.*

MR. TATARU: Move to strike. Non-responsive.

THE COURT: Overruled.

Q. (By MR. FOX) Now with regard to that study that you have there, are you familiar with the methodology used in making that study?

A. Yes.

Q. And is that a valid method of calculating the base rate?

A. Yes.

* * *

Q. As a result of that study were you able to find any difference in the philanthropic as opposed to the profit nursing homes?

A. Yes, based on the study, the cost for the profit homes should be about 50 percent higher -- or is -- the cost is about 50 percent higher and therefore *the rate should be about 50 percent higher for the profit homes than for the non-profit homes.* (Emphasis added)

Appellants offered *no* evidence to rebut this testimony. In fact, Appellants introduced *no* expert actuarial, insurance, or statistical evidence whatsoever. The evidence clearly showed that there was a sound, reasonable basis for the different classifications.

Further, Appellants' claim that "the question involved herein is substantial" somehow loses its sparkle when it is considered that these classifications were made somewhere near three-quarters of a century ago and further that Appellants are paying only for the losses which they themselves incur. It is respectfully submitted that if there were not a "significant" actuarial difference between the loss rate for these classes, or if the loss rate were higher for hospitals and non-profit homes, Plaintiffs–Appellants would not be before this Court.

II. WHERE NO EVIDENCE IS PRODUCED TO SHOW A VIOLATION OF THE ESTABLISHMENT CLAUSE, A CLASSIFICATION WILL NOT BE SET ASIDE.

Appellants have alleged that testimony at trial clearly established "an excessive government entanglement with religion in the classification scheme." (Appellants Memorandum p. 8) This allegation apparently stems from Appellants failure to understand what "excessive government entanglement" involves.

The Constitutional prohibition against excessive governmental entanglement with religion was found in the Establishment Clause of the First Amendment. This Court in *Everson v. Board of Education* 330 U.S.1, 67 S. Ct. 504, (1947) stated at page 15:

> The Establishment of Religion clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church, and neither can pass laws which aid one religion, aid all religions, or prefer on religion over another.

In a recent case, this Court set forth the standard to find a violation of the Establishment Clause. In *Committee for Public Ed., Inc. v. Regan,* 44 U.S. 649, 100 S. Ct. 840 (1980), the Court, per Justice White, stated:

> Under the precedents of this Court a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion. 100 S. Ct. at 846.

In the case *sub judice,* Appellants claim of "excessive entanglement" apparently is an argument that the State of Ohio somehow favors religions by not classifying hospitals, non-profit nursing homes and profit nursing homes all in the same category.

In reviewing the evidence before the Trial Court, however, the Court of Appeals could find no preference given on the basis of religion. The Ohio Court of Appeals noted that the testimony on this issue was given by Mildred Brady and John Bentz, both employees of the Bureau. The Court stated at page 1528 of its decision:

Mildred Brady, at one time the Director of the Underwriting Section of the Bureau of Workers' Compensation, testified that, while she was director, she would have determined classification on the basis of whether or not the particular nursing home was associated with a church.

However, the evidence indicates that Mrs. Brady also testified that she did not have the final authority to determine whether or not a particular employer of industry gets placed in a particular classification. Rather, she testified, while she was there, Mr. Bentz was the person who made the final determination and appeals could be taken from his decision to an adjudicating committee and then to the three commissioners.

Bentz testified: (Tr. 119)

Q. Mr. Bentz, would you *please tell us what the Underwriting Unit does to classify philanthropic homes?*

A. Well, *they must demonstrate to the Bureau that they are a non-profit status.*

Q. Does it have anything to do with whether they are religious or not?

A. *Under Manual Code 9062 there are religious organizations, but in addition to that there are other organiza-*

> *tions who just demonstrate non-profit status.* They are not affiliated, as such, with religious organizations. So there are the two included there. (Emphasis added.)
>
> We conclude that the trial court properly found no violation of the establishment clause of the United States Constitution or Ohio Constitution. (App. A-7) (emphasis in decision)

The fact that religious organizations are, for the most part, nonprofit organizations, is not a basis to find a constitutional violation. As can be seen, the uncontested facts proven at trial were that non-profit nursing homes, both religious and secular, were placed in manual no. 9062. The testimony further showed that this was based on sound insurance principles and such practice is common in the insurance industry.

CONCLUSION

For nearly three-quarters of a century the allegedly egregious acts of the Ohio Industrial Commission have escaped detection. Now Appellants claim that these acts are of great substance and that the Courts need guidance to illuminate the legal standards to be followed. This, however, is simply not the case.

Appellants produced absolutely *no* evidence to show that the actions of the Industrial Commission were based upon unsound insurance principals. Each and every expert testified that there was a "significant" actuarial difference between the classifications. Not only have

Appellants failed to show that their various constitutional rights have been violated, they have totally failed to show that they have been wronged in any way.

For the reasons set forth by both the Trial Court and the Ohio Court of Appeals, the Appellants simply failed to show any constitutional violations. Further, the fact that the profit nursing home industry must pay for the losses that it incurs and is not being subsidized by hospitals and non-profit nursing homes is not a substantial issue for review by this Court.

It is respectfully submitted that this Court should dismiss this appeal, affirm the decision of the lower courts, or, if appropriate, deny the petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Opposition to Jurisdiction was mailed to all parties or their counsel or record this _____ day of January, 1983, by regular U.S. mail service, postage prepaid.

BERNARD C. FOX, JR.
Assistant Attorney General

APPENDIX

NO. 81AP - 324

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Quality Health Service, Inc., et al.

Plaintiffs-Appellants

v.

William W. Johnston, Chairman,
Industrial Commission of Ohio, et al.

Defendants-Appellees

DECISION
Rendered on May 20, 1982

MR. TERRY TATARU
3040 East Main Street,
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and
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For Plaintiffs-Appellants

MR. WILLIAM J. BROWN, Attorney General,
MR. BERNARD C. FOX, JR., Assistant,
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For Defendants-Appellees.

COOK, J.

On December 22, 1980, appellants Quality Health Service, Inc., et al., filed a class-action suit requesting declaratory and injunctive relief on the basis that appellees William W. Johnston, Chairman, Industrial Commission, et al., set basic workers' compensation rates of contribution for employers in propriatary nursing homes which violated the equal protection, due process and establishment clauses of the United States Constitution and the Ohio Constitution, and R. C. 4121.131, 4123.29 and 4123.34.

After a trial, the court found that there was no violation of appellants' constitutional rights, and appellees acted pursuant to their statutory duties and entered judgment for appellees. The court also found that it did not have jurisdiction to enjoin the Industrial Commission.

Appellants have timely filed an appeal from the judgment of the trial court and have filed the following five assignments of error:

"1. The trial court erred by not finding that the appellants established violations of the equal protection and due process clauses of the United States and Ohio Constitutions beyond a reasonable doubt.

"2. The trial court erred by not finding that appellees violated the establishment clauses of the United States and Ohio Constitutions by determining a manual classification on the basis of religion for the purpose of setting rates of premiums for employers paying into the workers' compensation insurance fund.

"3. The trial court erred by finding that appellees acted pursuant to their statutory

duties in establishing the manual classifications for proprietary and philanthropic nursing homes.

"4. The trial court erred in finding that it lacked jurisdiction to issue an injunction as proper relief for statutory and constitutional violations.

"5. The trial court erred in admitting into evidence a purported study which lacked relevance and a proper foundation,"

The assigned errors are without merit.

Appellants' first assignment of error contends that appellees set the basic premium rates of contributions for employers in proprietary nursing homes differently than said rates for philanthropic nursing homes only on the basis of profit versus nonprofit. They argue that said action by appellees was arbitrary and capricious and violated their United States Constitution and Ohio Constitution equal protection and due process rights.

To be consistent with equal protection, a classification must rest upon some difference that bears a reasonable relationship to the act, in respect to which the classification is proposed. Mere arbitrary selection cannot be justified by being called classification. *Gulf, Colorado & Santa Fe Ry. v. Ellis,* (1897), 165 U.S. 150.

Appellants' due process arguments are apparently addressed to substantive process. As to substantive due process, the Ohio Supreme Court, in *State, ex rel. Allstate Ins. Co., v. Bowen, Supt. of Ins. et al.,* (1936), 130 Ohio St. 347, held that:

> "* * *If the laws passed by the state are seen to have a reasonable relation to a

> proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied."

In the cause *sub judice,* the evidence indicates that the Bureau of Workers' Compensation sets manual classifications subject to the approval of the Industrial Commission, and that a manual classification signifies a particular group by industry with some level of hazard and, therefore, are the same rate. The profit nursing homes were placed in Manual 9045, and nonprofit nursing homes were placed in Manual 9062. It was stipulated that the base rate differentials between the two manuals were different.

The evidence also indicated that, at the time the profit and nonprofit nursing homes were placed in the two different manual specifications, no study had been done to form a basis or justification for treating them differently. As a result of a meeting on February 15, 1979, appellees decided to merge the two manual classifications, effective July 1, 1979, because there was no "justification for a difference."

Appellees then requested the actuarial section of the Bureau of Workers' Compensation to perform an actuarial study to determine whether there was a difference. The results of the study showed a "significant" difference between the hazards of the profit nursing homes as compared to nonprofit nursing homes.

Based upon the study, appellee William W. Johnston reversed his order to merge the two classifications and restored the original classifications.

At trial, appellees also produced actuarial evidence which supported the classifications set forth in the State Insurance Fund Manual. Robert Finger, a fellow of the Casualty Actuarial Society and a member of the American Academy of Actuaries, testified in regard to a study he performed: (Tr. 96 - 101)

"A. Okay. What the study was was to take out of Manual 9062, which includes a group of charities or non-profit organizations - it extricated the nursing homes within that manual classification and treated that loss experience as if that had been a separate manual for the years 1978, 1979 and calculated what the base rates would have been for those years, had the non-profit nursing homes been split out.

"Q. And was that also done with 9045?

"A. 9045 is just the profit-making nursing homes, and they were already their own classification. So there's nothing special done with that.

"Q. Are you aware of any outside insurance carriers that split out, say of the nursing-home industry, on the basis of profitability or non-profit?

"MR. WEBSTER: Object.

"THE COURT: Overruled. You may answer.

"A. In malpractice insurance it is very common for hospitals and nursing homes to be classified based on the profit, non-profit or governmental status.

"MR. TATARU: Move to strike. Non-responsive.

"THE COURT: Overruled.

"Q. (By MR. FOX) Now with regard to that study that you have there, are you familiar with the methodology used in making that study?

"A. Yes.

"Q. And is that a valid method of calculating the base rate?

"A. Yes.

"* * *

"Q. As a result of that study were you able to find any difference in the philanthropic as opposed to the profit nursing homes?

"A. Yes, based on the study, the cost for the profit homes should be about 50 percent higher - or is - the cost is about 50 percent higher and therefore the rate should be about 50 percent higher for the profit homes than for the non-profit homes."

We conclude that the evidence shows that there was a sound, reasonable basis for the different classifications. Therefore, the different classifications for profit and non-profit nursing homes were not arbitrary or capricious, and thus did not violate the constitutional equal protection or due process provisions.

Appellants' second assignment of error contends that the trial court erred in finding that appellees did not violate the establishment clauses of the United States Constitution and Ohio Constitution. They argue that the

evidence shows that virtually all nonprofit nursing homes are affiliated with churches, and that church affiliation was the basis for the difference in manual classification between profit and nonprofit nursing homes.

Mildred Brady, at one time the Director of the Underwriting Section of the Bureau of Workers' Compensation, testified that, while she was director, she would have determined classification on the basis of whether or not the particular nursing home was associated with a church.

However, evidence indicates that Mrs. Brady also testified that she did not have the final authority to determine whether or not a particular employer of industry gets placed in a particular classification. Rather, she testified, while she was there, Mr. Bentz was the person who made the final determination and appeals could be taken from his decision to an adjudicating committee and then to the three commissioners.

Bentz testified: (Tr. 119)

"Q. Mr. Bentz, would you *please tell us what the Underwriting Unit does to classify philanthropic homes?*

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"Q. Does it have anything to do with whether they are religious or not?

"A. *Under Manual Code 9062 there are religious organizations, but in addition to that there are other organizations who just demon-*

strate non-profit status. They are not affiliated, as such, with religious organizations. So there are the two included there." (Emphasis added.)

We conclude that the trial court properly found no violation of the establishment clause of the United States Constitution or Ohio Constitution.

Appellants' third assignment of error argues that the trial court erred in finding that appellees did not violate their statutory duties.

R. C. 4123.29 states, in part, as follows:

"The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123. of the Revised Code, and to maintain a state insurance fund from year to year. * * *"

R. C. 4123.34, in pertinent part, states:

"The industrial commission, in the exercise of the powers and discretion conferred upon it in section 4123.29 of the Revised Code, shall fix and maintain, for each class of occupation, or industry, the lowest possible rates of premium consistent with the maintenance of a solvent state

> insurance fund and the creation and maintenance of a reasonable surplus, after the payment of legitimate claims * * *."

Appellants argue that the trial court's conclusion of law No. 4, which states "Plaintiffs must prove beyond a reasonable doubt that there is no state of facts which may reasonably be conceived which would justify separate 'State Insurance Fund Manual' classification, * * *" referred to their claim of statutory violations by appellees.

A reading of the trial court's findings of fact and conclusions of law indicates that, by his conclusions of law No. 3, 4, and 5, the trial court was speaking of "classifications" and the denial of equal protection.

The only finding by the trial court as to any violation of statutory duties is conclusion of law No. 11, which was a finding that there was no violation of appellees' statutory duties.

Appellants argue that the acts of appellees in carrying out their statutory duties acted in an arbitrary, capricious, and unreasonable manner. However, such argument is without merit for the reasons set forth as to the first assignment of error.

In their fourth assignment of error, appellants claim that the trial court erred in finding that it lacked jurisdiction to issue injunctions. However, such a finding cannot be prejudicial error since the court found appellees had not violated any constitutional or statutory provisions.

In their fifth, and final, assignment of error, appellants contend that the trial court erred in admitting into evidence a study by William Darlage, Operations Coordinator and Adjustment Unit Supervisor in the Actuarial Section of the Bureau of Workers' Compensation. The study attempted to determine the base rates of the manual specifications as they were used for the July 1, 1978, and July 1, 1979, rating periods.

However, the deposition of William Darlage was introduced by appellants during the trial. His study was marked as Exhibit A in the deposition.

It is well settled that a party cannot complain of error that he has introduced into the trial. A party who has introduced a deposition into evidence cannot avail himself of error in its admission. *Hulett v. Friedrich* (1926), 115 Ohio St. 25. Nor can a party complain that evidence is introduced by the adverse party which serves to explain or rebut evidence introduced by himself. *Thomas F. Taylor v. John Boggs,* (1870), 20 Ohio St. 516.

In view of the testimony of William Darlage, the "study" was relevant.

For the foregoing reasons, appellants' five assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, is affirmed.

Judgment affirmed.

WHITESIDE and MOYER, JJ., concur.

COOK, J., of the Eleventh District Court of Appeals, sitting by assignment in the Tenth District Court of Appeals.